88-1355

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Petitioner,

against

L. METCALFE WALLING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February 1, 1989

List of entities pursuant
to Rule 28.1:

Wall Street Transcript Corporation
Diplomatic World Bulletin
Publications, Inc.
Corporate Critics Confidential, Inc.
Credit Confidential, Inc.
Currency Credit Confidential, Inc.
Warndex Corporation
First Alert Decisions Corporation

Questions Presented.

1. (a) Is the integrity of the judicial process seriously compromised and public confidence therein undermined when the federal courts approve a deliberately false representation of counsel to the trial court made solely to achieve his trial strategy of improperly introducing into evidence the deposition of a key witness instead of calling her to testify and when the court prohibits further inquiry which would irrefutably confirm the proof that counsel knew the witness could appear in court as provided in Fed. R. Civ. Proc. 32?

(b) Can the deliberate misrepresentation of counsel constituting fraud on the court be excused when his adversary reveals the facts which prove the fraud if no prejudice is allegedly suffered by such adversary?

(c) Are the new, low standards created by the court below—excusing fraud on the court where the facts are later revealed and allegedly in the absence of prejudice — compatible with the need to preserve the integrity of the judicial process and consistent with the standard articulated by this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 278 (1944)?

2. (a) Is there a deprivation of the right to trial by jury when the appellate court upholds the jury verdict on a completely different legal theory (on which the jury was never instructed and which had been dismissed by the trial court before submission to the jury) and in the process resolves numerous factual questions which the jury never had an opportunity to decide?

(b) Is there a deprivation of the right to trial by jury where facts concerning the unreliability of a key document received into evidence are withheld from the jury?

3. Does the public interest in maintaining the integrity of the judicial system mandate a closer scrutiny and a searching substantive inquiry in the case at bar?

Table of Contents.

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
REASONS FOR GRANTING THE WRIT:	
I. The new standard created by the court below conflicts with decisions of this Court and has the effect of undermining the integrity of the judicial process	6
II. The court below deprived petitioner of its right to trial by jury by usurping the jury's function to decide issues of fact	10
III. A searching substantive inquiry into false representations by counsel is required to protect the public interest in the integrity of the judicial system	12
Conclusion	13
Certificate	14

Page

APPENDIX A—Opinion of the Court of Appeals dated September 19, 1988 ..... 1a

APPENDIX B—Order of the Court of Appeals dated November 3, 1988, denying rehearing *in banc* 1b

TABLE OF AUTHORITIES.

CASES:

Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988) 11

Deakins v. Monaghan, 108 S. Ct. 523 (1988)..... 7

Frisby v. Schultz, 108 S. Ct. 2495 (1988) 7

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)..... 6, 13

Jacob v. New York City, 315 U.S. 752 (1942) 10

Lyon v. Mutual Benefit Health and Accident Ass'n, 305 U.S. 484 (1938)..... 10

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978)..... 8

Shawkee Manufacturing Co. v. Hartford Co., 322 U.S. 271 (1944) 8

Taylor v. Illinois, 108 S. Ct. 646 (1988)..... 7, 12

United States v. Paradise, 480 U.S. 149 (1987) 7

Page

Virgin Islands Housing Authority v. David, 823 F.2d 764 (3d Cir. 1987)..... 8

Wheat v. United States, 108 S. Ct. 1692 (1988)... 7, 13

STATUTES:

Fed. R. Civ. Proc. 32..... 3, 8

28 U.S.C. § 1254(1) 2

OTHER AUTHORITY:

ABA Journal (November 1988)..... 9

7 Moore's Federal Practice Par. 60.33 (1987)..... 7

Wolfram, Modern Legal Ethics (1987)..... 9

No.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988.

WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Petitioner,

v.

L. METCALFE WALLING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI.

Petitioner Wall Street Reports and Intelligence Bulletin, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on Sep-

tember 19, 1988 (timely motion for rehearing *in banc* denied on November 3, 1988).[1]

Opinion Below.

The opinion of the Court of Appeals for the Second Circuit, reported at 858 F.2d 79, appears in the Appendix hereto at 1a.

Jurisdiction.

The opinion of the Court of Appeals for the Second Circuit was entered on September 19, 1988. A timely petition for rehearing *in banc* was denied on November 3, 1988 (1b). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions Involved.

The Fifth Amendment to the United States Constitution: ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

The Seventh Amendment to the United States Constitution: "In suits at common law . . . the right of trial by jury shall be preserved . . .".

Statement of the Case.

This is a diversity action brought against petitioner and others for alleged conversion of items of personal property during the period when the petitioner rented respondent's house in Bedford, New York.

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[1]The caption contains the names of all parties below, except for Mary Holman, whose dismissal as a defendant by the district court was upheld by the court of appeals, and Richard A. Holman, who is filing a separate petition.

Key testimony in support of respondent's claim was provided through the deposition of a non-party witness, Ida Bellotti, who erroneously stated at her deposition that she had attended a "tag sale" at respondent's Bedford house in 1981 or 1982 when it was occupied by petitioner. This pivotal evidence was used to persuade the jury to infer that petitioner had converted the property in question by publicly selling it for its own gain.[2]

However, respondent (an attorney) had spoken to Mrs. Bellotti before the trial and just after she had returned to New York from Florida where she was playing golf. He learned from her that she was mistaken at her deposition concerning the "tag sale" she had attended—it was not at the Walling residence (occupied then by the petitioner) but at some other home in the general area. Armed with this information, respondent's counsel implemented a strategy intended to mislead the jury.

Respondent's counsel offered to read in evidence Mrs. Bellotti's deposition testimony pursuant to Fed. R. Civ. Proc. 32(a)(3)(C), representing to the court that she was "unable to attend because of illness." This representation was exposed as false when Mrs. Bellotti walked unaided into the courtroom the very next day to testify pursuant to a subpoena issued by the petitioner. But after petitioner rested its case, respondent testified in rebuttal, providing hearsay testimony as to an alleged conversation with Mrs. Bellotti; and the trial court prohibited petitioner from presenting any further evidence.

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[2]The trial court received this testimony even though Mrs. Bellotti was not among the persons listed as witnesses in the joint pre-trial order. Her deposition had been taken in a courthouse, not in Mrs. Bellotti's home. The trial court adopted the double standard of enforcing the pre-trial order against petitioner but not against the respondent.

That hearsay testimony was the principal focus of the jury's attention as shown by questions addressed by the jury to the trial court during deliberations. Thus, respondent's strategy achieved the result of presenting him as the last witness to be heard by the jury without risk of contradiction by others. However, this tactic was accomplished at a far greater expense than the interests of the individual litigants—it was accomplished by a deliberate misrepresentation constituting fraud on the court and impairment of the integrity of the judicial system.

The court of appeals disregarded the argument that fraud on the court subverted the fair administration of justice and tainted the entire proceeding, requiring dismissal of the case (5a). First, the court of appeals said that the trial judge received the deposition based upon Mrs. Bellotti's deposition testimony that she had arthritis which made climbing stairs difficult.[3] However, the trial court did not evaluate the deposition testimony to make any findings of her ability to attend and testify, but ruled solely in reliance upon the representation of counsel. As the trial court explained to the jury: "During plaintiff's preparation [*sic*] of his case, he read the testimony of Mrs. Bellotti. That was permitted on the representation that she could not appear here personally to testify from the witness stand."

Second, the court of appeals excused counsel's misrepresentations by the comment that "any 'fraud' would have been exposed (and any possible prejudice avoided) when the appellants produced Bellotti in person as their witness" (5a). Thus, according to the court below, the fraud is ex-

[3]Indeed, the court of appeals mistakenly said that the question of Mrs. Bellotti's infirmity was in issue—not so. The issue as presented under Fed. R. Civ. Proc. 32 was her ability to attend and testify (5a).

cused when it is proved.[4] This incongruous result represents new standards which radically depart from the precedent established by this Court in a manner which undermines both the integrity of the judicial system and public confidence in the law.

The court of appeals also deprived petitioner of its right to a jury trial when it decided that the conversion theory embraced by the trial court and charged to the jury was in fact barred by the applicable statute of limitations (7a-8a). Nevertheless, it held that "Walling was entitled to elect a contractual remedy" (8a) and "[h]ad the court properly permitted the contractual claim to go to the jury . . . we conclude that the result would be unchanged" (9a). Thus, the court of appeals adopted a theory that had not been briefed on appeal nor charged to the jury, and proceeded to implicitly decide against petitioner all of the factual questions unique to a contract claim which the jury never had an opportunity to decide and which contract claim had been dismissed by the trial court before the case was submitted to the jury.

Finally, the trial court deprived petitioner of its right to a jury trial when it directed the alteration of a key document outside of the jury's presence. Respondent's spurious means of proving damages consisted of an alleged inventory of the contents of his house, dated December 1, 1968,[5] together with an alleged appraisal prepared by an expert on March 9, 1983, based upon a list provided by the respondent. However, there appeared items in the 1983 appraisal which

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[4]To dispel any possible doubt about the fraud or the knowledge of respondent's counsel, after the verdict petitioner moved for leave to take Mrs. Bellotti's deposition, but that motion was denied by the trial court and ignored by the court of appeals, although it was presented and briefed on appeal.

[5]That inventory was concededly erroneous as of the date petitioner took possession of the premises in 1971.

were *not* contained in the alleged 1968 inventory. This deficiency in the appraisal cast serious doubt upon its reliability, yet the trial judge simply directed counsel to redact the questionable items, and otherwise permitted the appraisal into evidence. Over objection, this exercise was performed outside of the presence of the jury, so that the serious discrepancy in the proof was completely withheld from the jury.

REASONS FOR GRANTING THE WRIT.

I.

The new standard created by the court below conflicts with decisions of this Court and has the effect of undermining the integrity of the judicial process.

This case presents far-reaching implications which go beyond the interests of the individual litigants to affect the integrity of the judicial process itself. In an era of wavering public confidence in the legal system and the lawyers who represent that system as officers of the court, it is imperative that the highest standards of integrity and forthright conduct are established and enforced.

This Court set such a high standard in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), when it stressed that

> . . . tampering with the administration of justice in the manner undisputedly shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that pre-

> servation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotant that they must always be mute and helpless victims of deception and fraud.

Those who would violate this high standard must pay the ultimate price— "nothing less than a complete denial of relief." *Id.* at 250.

Part of an orderly and efficient judicial system involves a respect for counsel and an expectation by the courts that they can rely upon the representations of counsel. See, e.g., *Taylor v. Illinois,* 108 S. Ct. 646, 656-57 (1988); *Frisby v. Schultz,* 108 S. Ct. 2495, 2501 (1988); *Deakins v. Monaghan,* 108 S. Ct. 523, 528 n.3 (1988); *United States v. Paradise,* 480 U.S. 149, 164 (1987); 7 *Moore's Federal Practice* Par. 60.33 at 359-60 (1987). Where that trust is breached, the system itself breaks down and public confidence erodes. For these reasons, the preservation of the integrity of the adversarial process is such a serious matter that it even overrides the right to counsel. *Wheat v. United States,* 108 S. Ct. 1692 (1988).

The court below ignored these policy considerations, and crafted a new standard which confuses the harm to the judicial process with damage to the litigant. The court of appeals rejected the fraud on the court argument because "any 'fraud' would have been exposed (and any possible prejudice avoided) when the appellants produced Bellotti in person as their witness" (5a). If this is the standard, it allows and encourages unscrupulous lawyers to make false representations to the court: if their falsehoods remain undetected, they will have gained an unfair advantage by deception; if they are caught in the lie, the fraud is "exposed" and prejudice avoided. This violates the standard previously

mandated by this Court. See *Shawkee Manufacturing Co. v. Hartford-Empire Co.*, 322 U.S. 271, 273 (1944) (wrongdoer's failure to fully disclose its fraudulent conspiracy, in light of fraud charges placed on the record, only "aggravated" rather than excused its previous deception).

If the new standard fashioned by the court below (which exonerates fraud because the facts are later revealed) is to be applied throughout the federal system, it not only contravenes decisions of this Court but conflicts with the standard adopted in other circuits, which treat fraud on the court as a serious matter warranting the imposition of severe sanctions. See, e.g., *Virgin Islands Housing Authority v. David*, 823 F.2d 764 (3d Cir. 1987); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

The court of appeals, moreover, cannot be allowed to skirt this serious issue by holding that the admission of Mrs. Bellotti's deposition testimony was a discretionary ruling based upon the trial judge's assessment of the facts concerning her alleged infirmity (5a). Despite the characterization by the court below, it is clear from the record that the trial court made no findings as to her ability to attend and testify at trial as required by Fed. R. Civ. Proc. 32, but rather accepted without reasonable inquiry the representation of counsel and relied entirely upon counsel's false representation in receiving the evidence. The trial judge explained to the jury that the reading of the Bellotti transcript "was permitted on the representation that she could not appear here personally to testify from the witness stand."

Instead of considering the damage to the integrity of the judicial process, the court of appeals treated the fraud on

the court issue as if it were a matter of discretion or subject to the "clearly erroneous" standard of appellate review. Such an approach does little to instill public confidence in the system and punish those who would betray that confidence. Such an approach subverts the administration of justice and defies the high standard of conduct announced by this Court in the *Hazel-Atlas* decision.

By finding one way or another to sanitize the blatant misrepresentation committed below, the opinion of the court of appeals addresses a recurring issue by creating an unfortunate precedent. It almost suggests that such conduct is expected of attorneys as a natural part of the rough and tumble of the adversary system; it plainly states that such conduct will be tolerated with impunity.

It is difficult to think of any other profession where the sort of conduct practiced by respondent's counsel and approved by the Court would be tolerated.[6] The standard announced below is incompatible with public confidence in the integrity of the legal process and is inconsistent with past decisions of this Court. The decision below should be reviewed by this Court in order to reaffirm the high standards of conduct expected of counsel, to reject the concept that false representations can so readily be excused and to instill public confidence that is reeling from the effect of abuses to the system well illustrated by the facts of this case.

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[6]See, e.g., Wolfram, *Modern Legal Ethics* at 3 (1986), which states that "public esteem for the legal profession is quite low;" see also the cover story entitled "Public Image of Lawyers," ABA Journal at 40 *et seq*, (November 1988).

II.

The court below deprived petitioner of its right to trial by jury by usurping the jury's function to decide questions of fact.

The court of appeals held that the trial court erred when it allowed the conversion claim to go to the jury because that theory was barred by the applicable statute of limitations (7a-8a). Nevertheless, the court held that respondent could recover the same damages under a breach of contract theory and that a proper instruction would have produced the same result (9a).

Constitutional rights should not be sacrificed for the sake of expediency or the need to dispose of cases. The result below infringed petitioner's right to due process and violated the Seventh Amendment, which preserves for every citizen the right to trial by jury as a fundamental guaranty to be scrupulously safeguarded. *Lyon v. Mutual Benefit Health and Accident Ass'n,* 305 U.S. 484, 492 (1938); *Jacob v. New York City,* 315 U.S. 752, 752-53 (1942).

The court of appeals thus found a convenient way of resolving the case by deciding for itself all of the factual questions unique to a contract theory that were not decided (nor even presented) to the jury under the conversion claim. Because of the differences in proof and the factual issues which must be resolved before contractual liability can be imposed, the case should have been remanded for a new trial on the basis of a contract theory. By simply concluding that "the result would be unchanged" (9a), the panel overlooked all of the factual findings which can only be made by a jury, and in effect usurped the function of the jury by simply assuming that these facts would be resolved against the petitioner.

These unresolved factual issues which affect contractual liability include: the existence of a valid contract and what its terms actually were,[7] the property covered by any such contract,[8] whether the relationship was in the nature of a bailment or landlord-tenant and what standard of care applied, whether the contract was modified, amended or terminated,[9] whether respondent's breach of the contract was sufficiently material as to excuse petitioner from further obligations, and whether performance of the contract was frustrated or rendered impossible.[10]

The court of appeal's fusion of proof of breach of contract with evidence of conversion overlooks the fact that liability in conversion does not *a fortiorari* result in contractual liability as well. The court below cannot be saying that no reasonable jury could find for petitioner on a contract theory; instead, it is erroneously substituting its own view of the facts to conclude that the jury would not have reached a different result. See *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2519 (1988).

Yet another instance of depriving petitioner of its right to a jury trial occurred when the trial court directed that an appraisal (respondent's principal proof of damages) be redacted outside of the presence of the jury. Had the jury been

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[7] The trial court improperly received parol evidence concerning what the parties intended when they entered into the written lease, but the jury was never asked to determine the scope of the contract.

[8] Certain areas of the house were specifically excluded from the lease, so that petitioner cannot be contractually liable for items missing from these excluded areas.

[9] Richard Holman testified that the terms of the lease were modified to require the landlord to remove all of his personal property from the premises.

[10] Respondent and his agents had taken various items of personal property from the house during the term of the lease, so that it was impossible for petitioner to return that which had already been removed.

permitted to hear about the discrepancies between the 1983 appraisal and 1968 inventory, it may have viewed respondent's proof of damages in an entirely different light.

These errors resulted in a deprivation of due process and the right to trial by jury, and required the judgment to be reversed.

III.

A searching substantive inquiry into false representations by counsel is required to protect the public interest in the integrity of the judicial system.

The important issues raised by the false representations of respondent's counsel in this case are not limited to the interests of the litigants but implicate public confidence in the integrity of the judicial system. This Court has condemned the willful and blatant attempt by defense counsel to gain a tactical advantage by discovery violations concerning the identity of witnesses. *Taylor v. Illinois,* 108 S.Ct. 646 (1988) ("More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself.") Where matters of evidence are concerned and the "central truth-seeking aim" of the judicial system is implicated, a "searching substantive inquiry" is required into the rationale behind the evidentiary ruling. *Id.* (Brennan, J., dissenting.)

If the goal of maintaining the integrity of the judicial process outweighs a defendant's rights under the Compulsory Process Clause of the Sixth Amendment. *Taylor v. Illinois, supra,* and the independent interest of ensuring that trials are conducted within the boundaries of fairness and ethical standards of the profession outweighs a defendant's

right to choose his own counsel under the Sixth Amendment, *Wheat v. United States*, 108 S.Ct. 1692 (1988), then the false representations present in this case which amount to "tampering with the administration of justice" likewise deserves heightened scrutiny by the Courts, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). The wrong committed in this case is a wrong against the public and an affront to the institutions designed to maintain an orderly society—it should have been taken seriously by the court of appeals and dealt with severely.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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February 1, 1989

CERTIFICATE.

JEFFREY H. DAICHMAN, hereby certifies that he is a member of the bar of the Supreme Court of the United States and states that three copies of the Petition for a Writ of Certiorari were mailed by postpaid First Class Mail to the following:

Lyman & Ash, Esqs., Attorneys at Law, 1612 Latimer Street, Philadelphia, PA 19103

Myles C. Cunningham, Esq., Attorney at Law, 666 Third Avenue, New York, NY 10017

Richard A. Holman, *Pro Se,* 99 Wall Street, New York, NY 10005

by depositing same in a United States Post Office at Walton, New York, with first class postage prepaid and that forty (40) copies were deposited in a United States Post Office at Walton, New York, with Express Mail postage prepaid and properly addressed to The Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.W., Washington, DC 20543.

Sworn to this 1st day of
February, 1989.

Notary Public
State of New York

APPENDIX A—Opinion of the Court of Appeals Dated September 19, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1314, 1315—August Term, 1987

(Argued June 15, 1988 Decided Sep. 19, 1988)

Docket Nos. 88-7073, -7101

L. METCALFE WALLING,

Appellee-Cross-Appellant,

v.

RICHARD A. HOLMAN, MARY HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Appellants-Cross-Appellees.

L. METCALFE WALLING,

Appellant,

v.

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

MARY HOLMAN,

Appellee.

Before OAKES, MESKILL, and PIERCE, *Circuit Judges.*

Appeal from a jury verdict awarding plaintiff $45,837 in damages for property injury and loss arising from the rental of residential property. *Held,* plaintiff was entitled to recover contractual damages for property loss. District court also failed to apply New York State's warranty of habitability provision, N.Y. Real Prop. Law § 235-b(1), which bars recovery for certain repairs to residential property.

Judgment affirmed in part, reversed in part, and remanded.

Samuel N. Greenspoon, Grutman, Miller, Greenspoon & Hendler, New York, NY, *for Appellant Wall Street Reports and Intelligence Bulletin, Inc.*

Richard A. Holman, New York, NY, *Appellant Pro Se.*

Cletus P. Lyman, Lyman & Ash Philadelphia, PA, *for Appellee Walling.*

Myles C. Cunningham, New York, NY, *for Appellee Mary Holman.*

OAKES, *Circuit Judge:*

Appellants Richard Holman and Wall Street Reports and Intelligence Bulletin, Inc. ("Wall Street Reports") appeal from a judgment entered by the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, holding them liable for the loss of furniture and other furnishings from a rented home in Bedford, New

York, and awarding L. Metcalfe Walling, the homeowner, damages in the amount of $45,837 plus interest.

Appellants' principal arguments are that the district court erred in allowing the deposition of a witness, Ida C. Bellotti, to be read at trial, and that the evidence was insufficient to support the jury's verdict. Appellants also argue that New York Real Property Law § 235-b(1) (McKinney 1988) prohibits recovery of certain damages related to the residential property, that the district court committed error in not dismissing Walling's action as time-barred under New York's three-year statute of limitations, that the court improperly pierced the corporate veil in holding appellant Richard Holman personally liable, and that the court improperly dismissed appellants' counter-claim as abandoned. On cross-appeal, Walling argues that the district court erred in refusing to charge the jury on defendants' contractual liability and on punitive damages and in dismissing appellee Mary Holman from the suit.

As to the cross-appeal, we find that the district court should have given a jury instruction on contractual liability, but that the jury's verdict was not affected by this failure. On Richard Holman's and Wall Street Reports' appeal, we affirm the judgment below except for certain damages awarded, which we reverse and remand to the district court for recomputation.

FACTS

In July 1971, while L. Matcalfe Walling was living abroad, his son rented his father's furnished house in Bedford, New York, to Wall Street Reports as a weekend residence for the corporation's 100% stockholder, Richard Holman. When the lease expired on September 4, 1972, an informal rental arrangement continued between the parties. Letters negotiating rent increases and other terms of occupancy were directed to Richard Holman personally, and bills relating to the property were paid from both Holman's

corporate accounts (including that of another wholly owned corporation, Wall Street Transcripts) and his personal funds. In 1978 Holman married Mary Holman, who sometimes accompanied him to the Walling residence.

In October 1979 Walling's niece, with his consent, removed some furniture from the house and reported to her uncle that that furniture and a piano remaining in the house were damaged. Walling testified that in 1979, when he last visited the property, he noticed that although the house still contained some of his furniture and part of his collection of objets d'art, other pieces were missing. In 1982 Richard and Mary Holman moved out of the house, leaving it empty except for the damaged piano. The roof had leaked, damaging the parquet floors, and a pool filter had to be replaced.

L. Metcalfe Walling commenced this suit on April 10, 1984, seeking recovery of damages based upon at least two[1] distinct theories: the defendants' contractual obligation to leave the house and furnishings in good repair, and the defendants' conversion of the personal property. Judge Metzner instructed the jury to award damages for injury to the house and to personal property in the possession of the plaintiff's niece if it found that the defendants had breached the lease by failing to surrender items in the same condition as they were received, less reasonable wear and tear. He instructed the jury to award damages for missing personal property if it found that conversion had occurred, but he refused to charge the jury on punitive damages or on contractual recovery for the missing items. The jury found for the plaintiff, awarding a total of $45,837 as follows:

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[1]Walling at times announced his intention to pursue a quasi-contractual claim for the missing items by ratifying a fictitious sale to Holman and suing for its proceeds. *See Baratta v. Kozlowski*, 94 A.D.2d 454, 464, 464 N.Y.S.2d 803, 809 (2d Dep't 1983). We need not discuss this further for the basis of recovery we sanction here leads to the same result, except as to cross-appellee Mary Holman. As to her, however, there has been no request for relief in the event of affirmance.

Breach of Contract

(a) Damage to the parquet floors	$1,950
(b) Damage to the beams and side walls	0
(c) Damage to the pool filter	401
(d) Damage to the glass door	126
(e) Refuse removal	110
(f) Damage to the piano	250
(g) Damage to furnishings in possession of Walling's niece	1,500

Conversion

(a) Damages for missing furnishings and other personal property	41,500

DISCUSSION

Appellants have expended considerable energy attempting to persuade this court that a "fraud on the Court" caused the district court's admission of the deposition of a witness, Ida C. Bellotti, on the ground that she was unable to attend because of infirmity. Plainly there was no such fraud, for the district court was aware that her infirmity was disputed. Appellants' trial counsel, contesting admission of the deposition, claimed to be "reliably informed that she [Bellotti] was playing golf" the previous week. Bellotti, however, testified at her deposition, under oath and in the presence of appellants' counsel, as to the nature of her difficulties, and the district court based its ruling on this testimony. Finally, any "fraud" would have been exposed (and any possible prejudice avoided) when the appellants produced Bellotti in person as their witness. The trial judge was then in a position to observe Bellotti's physical condition and to determine whether sanctions, including striking the deposition from the record, were appropriate. We consider his decision to forego such sanctions dispositive.

Appellants are precluded from challenging the sufficiency of the evidence because they failed to move for a directed verdict at trial in accordance with Fed. R. Civ. P. 50(b). *See Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 816-17 (2d Cir. 1970). We also dispose summarily of appellants' argument that the district court erred in dismissing with prejudice appellants' counterclaim for money expended on repairs. The counterclaim did not appear in the pretrial order, nor was any request made for a jury charge on the claim. Thus, dismissal on the ground of abandonment was proper. *See Schenck v. Bear, Stearns & Co.*, 583 F.2d 58, 60 (2d Cir. 1978).

Next, appellant Richard Holman, noting that the original lease was signed by the corporate defendant, Wall Street Reports, challenges the district court's ruling that he could be held personally liable under the lease for damage to the property. We affirm the district court for two reasons. First, as Judge Fuld wrote in *Walkovszy v. Carlton*, 18 N.Y.2d 414, 418, 223 N.E.2d 6,8, 276 N.Y.S.2d 585, 588 (1966), where "the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends," the stockholders may be held personally liable for corporate debts. *See Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1230 (E.D.N.Y. 1978), *aff'd* 599 F.2d 34 (2d Cir. 1979). Here, the use of the corporation to rent a residence for the sole stockholder's use cannot limit Holman's personal liability. Second, the evidence presented at trial showed that Holman personally negotiated extensions of the lease with Walling and supports Judge Metzner's implicit finding that Holman and Wall Street Reports were jointly liable beyond the term of the original lease.

We do not, however, affirm the entire award. Certain damages, namely those relating to the condition of the reality when defendants vacated the premises, as a matter of law are not recoverable by the landlord. New York Real

Property Law § 235-b(1) creates a warranty of habitability in "every written or oral lease or rental agreement for residential premises." This appears to cover—at a minimum—the water damage to the floors caused by a leaky roof. The New York Court of Appeals has interpreted § 235-b as a legislative remedy "to compel . . . landlord[s] to make necessary repairs or provide essential services." *Park West Management Corp. v. Mitchell,* 47 N.Y.2d 316, 325, 391 N.E.2d 1288, 1292, 418 N.Y.S.2d 310, 314, *cert. denied,* 444 U.S. 992 (1979). *See also, e.g., Kachian v. Aronson,* 475 N.Y.S.2d 214, 218, 123 Misc.2d 743, 746-47 (N.Y.C. Civ. Ct. 1984) (warranty covers water leakage). We reject appellee Walling's contention that the warranty is limited to conditions that endanger life, health, and safety, because the warranty extends to maintenance of the premises "in accord with the uses reasonably intended by the parties," *Park West Management Corp.,* 47 N.Y.2d at 325, 319 N.E.2d at 1293, 418 N.Y.S.2d at 315. The district court mistakenly believed that the lease could vary such terms. The statute, however, expressly voids all contractual attempts to make a residential tenant surrender rights under the warranty. N.Y. Real Prop. Law § 235-b(2). Only damage caused by the tenant's "misconduct" is exempt by the statute. *Id.* § 235-b(1). Since the district court did not apply the statute, no determination was made as to the scope of the warranty in this case and its effect on the damages. Accordingly, we remand this issue to the district court for a reassessment of the damages relating to injury to the residential property.

We next address appellants' statute of limitations argument. Under the alternative theory of conversion advanced by Walling at trial and charged by the court, some furnishings were missing or damaged beyond repair in 1979 when he and his niece last viewed the premises, and others were sold at a tag sale held sometime between 1979 and 1982. The district court erroneously concluded that the statute of

limitations began to run in 1982. In conversion actions, however, the statute of limitations ordinarily begins to run when the conversion takes place, rather than when the injured party discovers the injury and makes a demand for the property. *See Al-Roc Prods. Corp. v. Union Dime Sav. Bank*, 74 A.D.2d 834, 834, 425 N.Y.S.2d 525, 526 (2d Dep't 1980) (mem.); *Guild v. Hopkins*, 271 A.D. 234, 244, 63 N.Y.S.2d 522, 531 (lst Dep't 1946), *aff'd*, 297 N.Y. 477, 74 N.E.2d 183 (1947); *Pollack v. Warner Bros. Pictures, Inc.*, 266 A.D. 118, 120, 41 N.Y.S.2d 225, 226 (lst Dep't 1943) (*per curiam*); *cf. Lehman v. Lehman*, 591 F. Supp. 1523, 1527 n.20 (S.D.N.Y. 1984) (only where defendant committed "no overt act of conversion by an unlawful sale or disposition of the property" does statute of limitations begin to run when demand for property is refused). The tag sale and the defendants' removal of property might have started the limitations period running as to some items as early as 1979. The three-year statute of limitations applicable to property actions, N.Y. Civ. Prac. L. & R. 214(4) (McKinney Supp. 1988), would therefore bar tort claims for goods converted before April 9, 1981.

Nonetheless, because the appellants' liability "had its genesis in [a] contractual relationship," *Sears, Roebuck & Co. v. Enco Assocs., Inc.*, 43 N.Y.2d 389, 396, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 771 (1977), in the form of a lease, Walling was entitled to elect a contractual remedy for the loss of the missing items and be governed by the six-year contractual statute of limitations. *See id.; see also Video Corp. of America v. Frederick Flatto Assocs.*, 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S.2d 439 (1983); *Baratta v. Kozlowski*, 94 A.D.2d 454, 460-64, 464 N.Y.S.2d 803, 807-10 (2d Dep't 1983).

The election of remedies should have been made at trial at a time within the discretion of the trial judge. *Baratta*, 94 A.D.2d at 464, 464 N.Y.S.2d at 809. As the statute of limitations for contractual actions is six years, N.Y. Civ.

Prac. L. & R. 213(2) (McKinney Supp. 1988), Walling not surprisingly requested the court to charge the jury on a contract claim. As we have said, the district court disregarded Walling's request and charged the jury only on the conversion claim, failing, however, to disallow the time-barred conversion claims. Had the court properly permitted the contractual claim to go to the jury, however, we conclude that the result would be unchanged. Because the court refused to charge the jury on punitive damages, the tort damages awarded to Walling, which were equivalent to the value of the property, were identical to contractual damages for appellants' failure to turn over the items at the end of the lease.

Finally, we conclude that appellee Mary Holman was properly dismissed as a defendant in this case, as she was served more than three years after any alleged conversion of the property, and at no time entered into any contractual relationship with Walling which would permit recovery under the more generous statute of limitations. *Cf. Sears, Roebuck,* 43 N.Y.2d at 396-97, 372 N.E.2d at 558-59, 401 N.Y.S.2d at 771.

Judgment affirmed in part, reversed in part, and remanded to the district court for a recalculation of damages.

APPENDIX B—Order of the Court of Appeals Dated November 3, 1988, Denying Rehearing In Banc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of November one thousand nine hundred and eighty-eight.

L. METCALFE WALLING,

Appellee-Cross-Appellant,

v.

RICHARD A. HOLMAN, MARY HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Appellants-Cross-Appellees.

L. METCALFE WALLING,

Appellant,

v.

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

MARY HOLMAN,

Appellee.

Docket Nos. 88-7073, -88-7101

Petitions for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsels for the Appellants Wall Street Reports and Intelligence Bulletin, Inc., and Richard A. Holman.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing *in banc* have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk
By: FRED M. CASSIDY
Chief Deputy Clerk.

Filed Nov. 3, 1988
United States Court of Appeals
Second Circuit
Elaine B. Goldsmith, Clerk